IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

Criminal Appeal No. 424 of 2006.

Judgement reserved on: 10.8.2007.

Date of decision: 3.9.2007.

Ashwani Kumar ….. **Appellant- accused.**

Vs.

State of H.P. …. **Respondent.**

Coram

The Hon'ble Mr. Justice Kuldip Singh, Judge.

Whether approved for reporting?[1]

For the Appellant : **Ms. Subh Mahajan, Advocate.**

For the Respondent : **Mr. Ashok Chaudhary, Additional Advocate General.**

Kuldip Singh, Judge.

The accused is in appeal against judgement dated 30.9.2006 recorded by the learned Special Judge, Mandi, in Sessions Trial No. 21 of 2003, under Section 20 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short, the Act) thereby convicting and sentencing the accused for five years rigorous imprisonment and fine of Rs. 5000/- and in default of payment of fine to further undergo imprisonment for three months.

2. The facts in brief are that on 20.2.2003 at about 5 p.m. Head Constables Lal Chand, Kuldip Chand, constables Nand Lal, Hoshiar Singh, LHCs Hans Raj and Jagat Ram were in Pandoh Bazar

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Whether the reporters of the local papers may be allowed to see the Judgment?

in connection with patrolling and traffic checking. H.R.T.C. bus bearing No. HP-34-3169 came from Kullu side and was on way to Kotli Kun and was stopped by police party for checking. Head Constable Lal Chand, constables Nand Lal, Hans Raj entered the bus and started checking of luggage as well as the passengers. On seeing the police party, a passenger sitting on seat No. 46, became nervous. PW 12 ASI Lal Chand inquired his name, who disclosed his name as Ashwani Kumar. He was suspected to be carrying some contraband and, therefore, he was given an option vide memo Ex. PA either to get himself searched from the Gazetted Officer or Executive Magistrate. The accused opted for his search by police party and accordingly an endorsement was made to this effect on Ex. PA in presence of witnesses.

3. PW 12 ASI Lal Chand gave his search to the accused in presence of PW 1 and PW 2, vide memo Ex. PB. The Investigating Officer conducted personal search of the accused and found two packets of charas from each shoe of the accused, scale and weights were arranged through PW 3 Nand Lal. The recovered charas was weighed and was found to be 600 grams, which was in the form of sticks. Two samples of 25 grams each were separately taken by the Investigating Officer and were put in separate parcels of cloth and he sealed each of the parcel with seal “A”. The remaining bulk charas was put in separate parcel and was also sealed with seal “A”. The specimen of seal “A” was also taken on a piece of cloth by the Investigating Officer. He filled in NCB form Ex. PN in triplicate. The impression of seal “A” was also taken on NCB form. The recovered

charas was taken into possession vide memo Ex.PC. Thereafter the accused was arrested.

4. PW 12 ASI Lal Chand thereafter prepared rukka Ex. PQ, which was sent through constable Nand Lal to Police Station, Sadar for registration of the case. PW 11 on receipt of rukka from constable Nand Lal registered FIR Ex. PL. He made an endorsement Ex. PM on rukka and handed over the file to Nand Lal, who in turn handed over the file to Investigating Officer on the spot. ASI Lal Chand prepared site plan Ex. PR. The accused was informed the grounds of his arrest. The case property was produced before PW 11 SHO K.D.Sharma alongwith NCB form, specimen seal "A" and other documents. SHO K.D.Sharma resealed the bulk charas as well as the sample parcels with seal "O" and specimen of seal "O" was also taken on NCB form Ex. PN. The two parcels of samples of charas duly sealed with seal "O" alongwith NCB form, sample seals, seizure memo and the case property was deposited by SHO K.D.Sharma, which was entered in the Malkhana register.

5. One sample parcel alongwith NCB form, copy of FIR, seizure memo as well as specimen seals "A" and "O" and other documents were sent through constables Safi Mohammad PW 5 on 28.2.2003, who deposited the same with CTL, Kandaghat on the same day. On 21.2.2003, Investigating Officer Lal Chand PW 12 sent the special report Ex. PJ through constable Nand Lal, which was received by PW 7 Ms Subhara Tiwari Dy. S.P. Headquarters. On receipt of the report of the Chemical Examiner Ex.PP, challan was prepared by the SHO and the same was filed in the court. After the

conclusion of the trial, the learned Special Judge convicted and sentenced the accused, as stated above. The accused is in appeal against his conviction and sentence.

6. I have heard Ms. Subh Mahajan, learned counsel for the accused and learned Additional Advocate General, for the respondent. The learned counsel for the accused has submitted that the learned Special Judge has misconstrued, misinterpreted the material on record in returning the finding that the charas was recovered from the person of the accused. She has submitted that there are material contradictions in the statements of prosecution witnesses. The shoes of the accused, which he was allegedly wearing and in which the charas was allegedly concealed at the time of search were not taken into possession. She has submitted that prosecution has miserably failed to prove the case against the accused. She has also submitted that stringent punishment is provided in the Act and, therefore, the evidence on record is to be scrutinized very closely. The learned Additional Advocate General has supported the impugned judgement.

7. The charge against the accused is that he was occupying seat No. 46 in bus No. HP-34-3169 when 600 grams of charas was recovered from his possession. PW 1 Tek Chand Conductor of bus No. HP-34-3169 has stated that accused Ashwani Kumar was sitting on seat No. 35 or 36. He has stated that he had not seen the police taking out charas from the shoes of the accused. He was declared hostile. In the cross- examination of PW 1, conducted by the Public Prosecutor, a positive suggestion has been

given to him that on search of the wife of the accused, charas was recovered from her by the other police party. PW 2 Mohinder Singh did not support the prosecution and he was declared hostile. PW 3 constable Nand Lal has stated that at about 4 p.m. on 20.2.2003, he alongwith HC Lal Chand and LHC Hans Raj boarded bus No. HP 34-3169 from the rear door. The accused was sitting on seat No. 46. On personal search of accused conducted by the Investigating Officer in presence of witnesses PW 2 Mohinder Singh, PW 1 Tek Chand, two packets each were recovered from the shoes of the accused. The recovered charas was then weighed and it was found 600 grams. In cross-examination he has stated that Head Constables Kuldip Chand, Hoshiar Singh and Jagat Ram boarded the bus from front door. He denied the suggestion that accused was sitting on seat No. 36 alongwith his wife.

8. PW 6 HC Naresh Kumar has stated that on 21.2.2003, the then Dy. S.P. Shubhara Tiwari handed over special report of this case, which was received by her through constable Nand Lal on the same day. He has proved true photo copy of special report Ex. PJ and endorsement of Dy. S.P. Ex. PJ/1 and endorsement made by him Ex. PJ/2. PW 7 Ms. Shubhara Tiwari, Dy. S.P. has stated that she made endorsement Ex. PJ/1 on report Ex. PJ.

9. PW 10 Hans Raj has stated that on 20.2.2003 ASI Lal Chand, Constable Nand Lal and he himself boarded the bus HP 34-3169 from rear door and others boarded the bus from front door. The accused was occupying seat No. 46. The accused was searched in his presence as well as in presence of Tek Chand PW 1, Mohinder

Singh PW 2, who was standing near the bus. Police recovered from the shoes of the accused, which he was wearing, two packets from each shoes and after opening the polythene packets, charas in the form of sticks was found therein. In cross examination, he has stated that accused was all alone on one berth of the seat. He has denied the suggestion that accused was sitting with his wife Shital Kaur in the bus. He has stated that no other case regarding recovery of charas from any passenger was made on that date by their police party. They remained inside the bus for about 2 and 2½ hours and entire proceedings were completed inside the bus. The accused was wearing socks also, but socks and shoes of the accused were not taken into possession by the Investigating Officer. The shoes were of the size of the accused.

10. PW 12 ASI Lal Chand has stated that he alongwith constable Nand Lal and Hans Raj entered the bus and started checking the luggage and the passengers. The accused was sitting on seat No. 46. He gave his personal search to the accused in presence of PW 2 Mohinder Singh and PW 1 Tek Chand. In cross-examination, he has stated that accused was sitting alone on the seat. The personal search of the accused was not conducted inside the bus. He remained inside the bus for 8-10 minutes. The accused was wearing socks but the charas was not inside the socks.

11. DW 1 Bharat Bhushan, Criminal Ahlmad was examined by the accused in defence and from the file of Sessions Trial, titled as State Vs. Shital Kaur, under Section 20 of the Act, he proved Ex. D-1 copy of statement of Nand Lal, Ex. D 2 copy of statement of HC

Hoshiar Singh and Ex. D-3 copy of statement of HHC Jagat Ram, Ex. D-4 copy of FIR and Ex. D-5 copy of rapat No. 10.

12. The case of the accused is that he was sitting on seat No. 36 in bus No. HP 34-3169 and his wife Shital Kaur was sitting with him on the next seat. According to him no charas was recovered from his person as alleged by the prosecution and he has been falsely implicated in the case. There are material contradictions in the prosecution story regarding the recovery of charas from the person of the accused. The presence of wife of the accused sitting with him in the bus has been established. The prosecution has given positive suggestion to PW 1 Tek Chand in cross examination that charas was recovered from the wife of the accused on search by the other police party. In other words, the prosecution admits that the wife of the accused was sitting in the bus when personal search of the accused was conducted. Ex. D-2 is the statement of PW 7 HC Hoshiar Singh in Sessions Trial, titled as State of H.P. vs. Shital Kaur wife of Ashwani Kumar. In Ex. D-2 HC Hoshiar Singh has stated that on 20.2.2003 at about 4 p.m. when he alongwith constables Jagat Ram and Nand Lal boarded the bus No. HP 34-3169 from the front door, a lady was sitting on seat No. 34, who disclosed her name Shital Kaur, 200 grams charas was recovered from a bag, which was kept by this lady between her legs. In Ex. D-3 HHC Jagat Ram has stated that on 20.2.2003 at about 4 p.m. he alongwith HC Kuldip Singh boarded bus No. HP 34-3169 from front door and they found Shital Kaur sitting on seat No. 34.

13. It has been established that at the time of checking wife of accused and the accused were sitting in bus No. HP 34-3169 on seat No. 34 and adjoining seat. As per sitting plan in the bus normally there is much gap in between seat Nos. 34, 35, 36 and seat No. 46. The trial court has not considered Ex. D 2 and Ex. D 3 wherein Shital Kaur wife of accused has been stated to be sitting on seat No. 34 in bus No. HP 34-3169. PW 1 Tek Chand has stated that accused was sitting in the bus on seat No. 35 or 36. It is not the case of the prosecution that accused and his wife were sitting in the bus on seats No. 46 and 34 (or even 35 or 36). In normal course husband and wife would sit in the bus on adjoining seats. Once it has been established that accused was sitting on seat No. 36 (or even 34, 35) in the bus, it creates serious doubt in the prosecution story that accused while sitting on seat No. 46 was carrying 600 grams charas in his shoes.

14. PW 1 Tek Chand and PW 2 Mohinder Singh, recovery witnesses, have not supported the prosecution. PW 10 Hans Raj has stated that they remained inside the bus for 2 to 2½ hours and the entire proceedings were completed inside the bus. It is not the case of the prosecution that PW 2 Mohinder Singh alleged recovery witness was a passenger in the bus, but no prosecution witness has stated that PW 2 Mohinder Singh entered the bus at the time of recovery of alleged contraband from the accused. PW 12 ASI Lal Chand has stated that he wrote option and consent memo near the bus, meaning thereby the accused was outside the bus at the time of preparing the option and consent memo Ex. PA. He has also stated

that witnesses including Mohinder Singh were with him outside the bus at that time. He prepared consent memo Ex. PA 10-15 minutes after coming out of the bus. He has specifically stated that the personal search of the accused was not conducted inside the bus. In special report Ex. PJ, rukka Ex. PQ, PW 12 has nowhere stated that recovery of charas from accused Ashwani Kumar was made from his shoes outside the bus after he was taken out from the bus, even otherwise perusal of Ex. PQ and Ex. PJ nowhere suggests that recovery was made from the accused outside the bus. There are major contradictions regarding the place of recovery, as per PW 10 recovery of charas was made from the accused inside the bus, but as per PW 12 recovery of charas was made outside the bus. These contradictions create doubt in the prosecution story.

15. The learned counsel for the accused has submitted that it is not possible to conceal inside the shoes 600 grams of charas when the shoes were of the size of the feet of the accused with the allegation that the accused was wearing the shoes at the time of recovery. It has also come on record that the accused was wearing socks and shoes, which were of his fitting. It has been alleged that charas was outside the socks but inside the shoes. The shoes of the accused were not taken into possession. It is not believable that the accused while wearing the socks would keep the sticks of the charas outside the socks. There is substance in the objection of the learned counsel for the accused that an adverse inference is to be drawn against the prosecution for not taking into possession shoes of the accused and producing the said shoes during trial.

16. The cumulative effect of the above discussion is that prosecution has failed to prove the recovery of charas from the person of the accused beyond reasonable doubt. The impugned judgement of conviction and sentence passed against the accused is thus not sustainable.

17. As a result of the above discussion, appeal is allowed. The judgement of conviction and sentence, dated 30.9.2006, passed by learned Special Judge, Mandi, in Sessions Trial No. 21 of 2003, is set-aside and accused is acquitted of the charge, he be set free forthwith, if his detention is not required in some other case.

September 3, 2007. **(Kuldip Singh)**
(*Hem*) **Judge.**